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# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. **231**

COWELL PORTLAND CEMENT COMPANY,  
a corporation,

*Petitioner,*

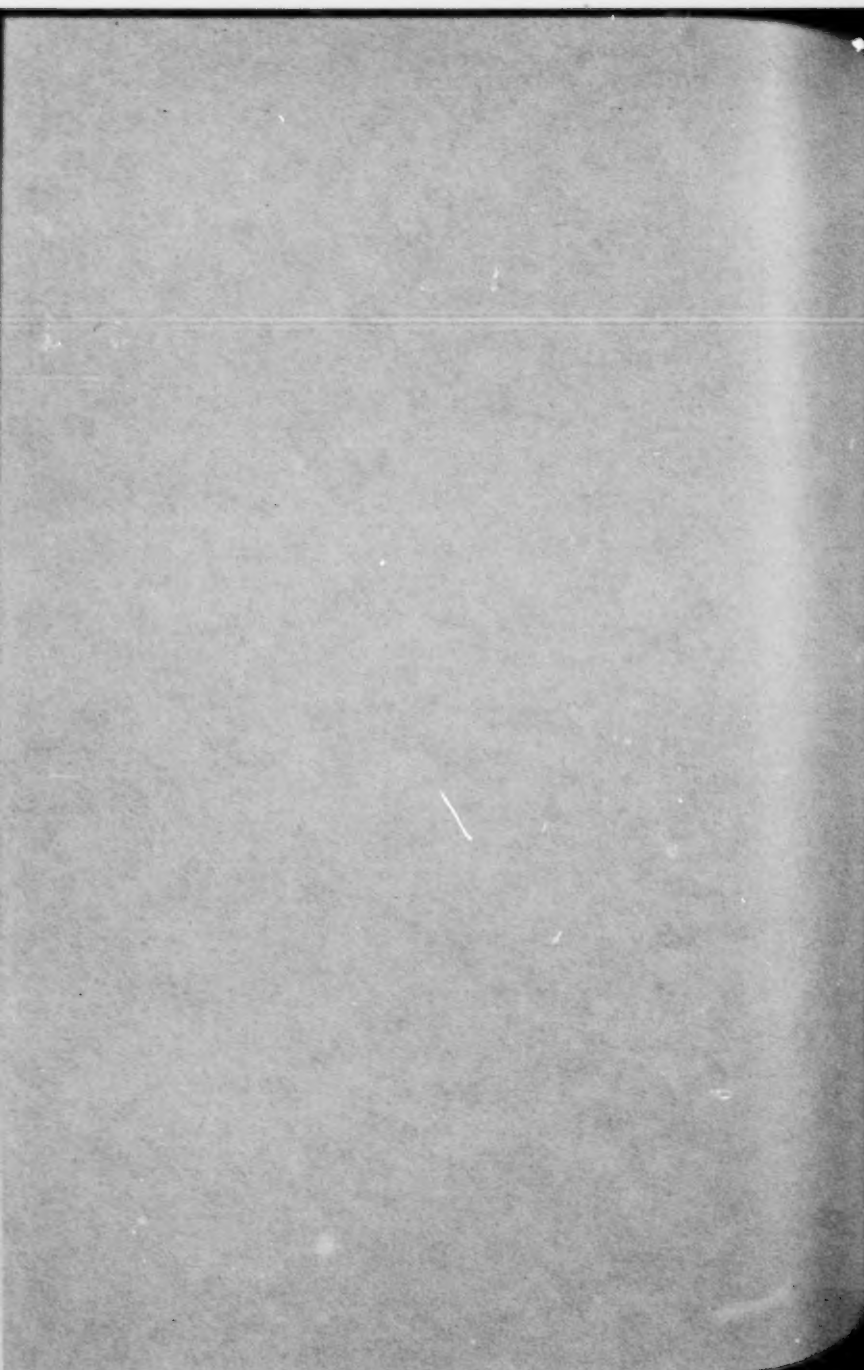
vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

Petition for a Writ of Certiorari to the United States  
Circuit Court of Appeals for the Ninth Circuit  
and  
Brief in Support Thereof

MAX THELEN,  
GORDON JOHNSON,  
111 Sutter Street,  
San Francisco, California,  
*Attorneys for Petitioner.*



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COWELL PORTLAND CEMENT COMPANY,  
a corporation,

*Petitioner,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

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## **Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit**

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*To the Honorable the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, Cowell Portland Cement Company,  
respectfully shows:

A.

### **SUMMARY STATEMENT OF THE MATTER INVOLVED**

Petitioner, Cowell Portland Cement Company, a California corporation, has at all times herein relevant owned and operated a plant for the manufacture of cement at Cowell, Contra Costa County, California.

On July 17, 1937, Local No. 356 of International Union, Mine, Mill & Smelter Workers of America, hereinafter at times referred to as the C.I.O. Union, filed with the National Labor Relations Board, hereinafter at times referred to as the Board, a charge that petitioner had engaged and was engaging in unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C.A., §158. On August 20, 1937, based on said charge and a supplemental charge, the Board issued a complaint against petitioner. Hearings were had and on September 6, 1938, the Board made and filed an order against petitioner. On February 6, 1939, the Board petitioned the United States Circuit Court of Appeals, Ninth Circuit, for the enforcement of said order. The Court permitted an A. F. of L. Union, known as Lime & Cement Employees Union of Contra Costa County, Local 21,074, hereinafter referred to as the A. F. of L. Union, whose members were actually doing the work in the cement plant, to intervene. A hearing was had and on November 28, 1939, the Court rendered its decision holding that in the interest of "fair play", the Board should have made the A. F. of L. Union a party to the complaint "and proceeded to a hearing which would have avoided all this delay and confusion." The Court remanded the proceeding to the Board. *National Labor Relations Board v. Cowell Portland Cement Company*, 108 Fed.(2d) 198, 206.

On February 16, 1940, the Board set aside its order of September 6, 1938 (R. 1) and on April 29, 1940, the Board made its order setting aside the record and referring the case to the Regional Director for a new hearing (R. 2-3). On May 8, 1940, the C.I.O. Union filed a new charge (R.

3-6) and on May 11, 1940, the Board issued a new complaint, based on said charge (R. 8-25). The complaint was served on petitioner and Local 86, another A. F. of L. Union. The case was tried on a new record and on April 18, 1942, the Board issued the decision and order which are the subject of this proceeding (R. 412-522).

On April 27, 1942, petitioner advised the Regional Director of the Board in writing that it considered the Board's decision and order to be unwarranted in law and in fact and that petitioner preferred to have the issues adjudicated by a court of law (R. 540-1). On February 23, 1943, the Board filed with the United States Circuit Court of Appeals, Ninth Circuit, its petition for the enforcement of said decision and order of April 18, 1942 (R. 524-35). On March 31, 1943, the petitioner filed its answer to said petition (R. 539-47) and on March 31, 1943, United Cement, Lime and Gypsum Workers International Union, Local No. 86, an A. F. of L. Union, filed its answer (R. 547-54). Following the filing of briefs and the holding of oral argument, the matter was submitted to the Court on February 9, 1944 (R. 3667).

On March 6, 1945, the Court filed its opinion. On the same day, the Court entered its decree enforcing the Board's order, as modified. Timely petitions for rehearing were filed by petitioner on March 26, 1945, by Local 86 on March 26, 1945, and by the Board on March 27, 1945 (R. 3701). On April 23, 1945, the Court made and filed its order denying each of said petitions for rehearing (R. 3701).

On April 25, 1945, the Court made its order staying the issuance of its mandate.

As will be specifically set forth in subsequent portions of this petition and in the accompanying brief, the matters here involved include what we believe to be important questions concerning

(a) the jurisdiction of the National Labor Relations Board;

(b) the validity of the Board's order as to back pay; and

(c) the validity of the Board's order as to reinstatement.

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## B.

### JURISDICTION

1. The jurisdiction of the Supreme Court of the United States to issue the writ of certiorari herein prayed for is invoked under Judicial Code, Section 240(a), as amended by the Act of February 13, 1925, 43 Stat. 936 (28 U.S.C., Section 347(a)).

2. The judgment which is sought to be reviewed was entered by the United States Circuit Court of Appeals, Ninth Circuit, on March 6, 1945 (R. 3668-3700). A petition by petitioner for a rehearing (filed within the time allowed by the rules of said Circuit Court of Appeals) was denied on April 23, 1945 (R. 3701).

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## C.

### THE QUESTIONS PRESENTED

The following questions are presented:

1. In a case in which the Board's findings affirmatively declare that the employer is not engaged in com-

merce (as defined in the Act) and in which there is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else, does the Board have jurisdiction?

A subsidiary question under the head of jurisdiction is as follows:

In the case of an administrative tribunal such as the National Labor Relations Board, is the tribunal's jurisdiction to be determined on the facts which exist at the time when the tribunal renders its decision or at the time when the complaint before the tribunal was filed?

2. May the Board, in a case of an unfair labor practice by the employer, award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement?

In other words, may a striking employee, at one and the same time, both strike and receive back pay for the period during which he is on strike?

3. May the Board award back pay for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge?

4. In a case in which the employee has secured other regular and substantially equivalent employment, may the Board direct reinstatement without making a finding of fact showing that the effectuation of the policies of the Act require such reinstatement?

## D.

**REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT**

Petitioner respectfully submits the following reasons for the allowance of the writ:

1. The above questions are questions of importance in the administration of the National Labor Relations Act.

Among the most recent decisions of this Court in which certiorari was granted, on that ground, to review decisions of the National Labor Relations Board, we cite the following:

- Polish National Alliance v. National Labor Relations Board*, 322 U.S. 643, 644;
- National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111, 113;
- Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678, 680;
- National Labor Relations Board v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 11;
- National Labor Relations Board v. Electric Vacuum Cleaner Co., Inc.*, 315 U.S. 685, 690.
- National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U.S. 469, 476;
- National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 430-1.

2. It is desirable, in order to facilitate the proper administration of the Act, to secure a decision by this Court on the following questions which have not heretofore been decided by this Court:

- a. In a case in which the Board's findings affirmatively declare that the employer is not engaged in commerce (as defined in the Act) and in which there

is neither finding nor evidence that the employer's acts burden or obstruct the commerce of anyone else, does the Board have jurisdiction?

b. Is the jurisdiction of the Board, an administrative tribunal, to be determined on the facts which exist at the time when the Board renders its decision or at the time when the complaint before the Board was filed?

c. May the Board, in a case of an unfair labor practice by the employer, award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement?

d. May the Board award back pay for the period of time during which the employees unreasonably delay the filing with the Board of a proper charge?

3. The decision of the United States Circuit Court of Appeals that the Board's order as to reinstatement is not unlawful, notwithstanding the fact that it was made in the absence of adequate findings of fact showing that the effectuation of the policies of the Act requires that in this case the employer must offer reinstatement to former employees even though they have secured other regular and substantially equivalent employment, is in conflict with the decision of the Supreme Court of the United States in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 193, 196, 198, 200.

In that case, the Supreme Court held that said remedy does not automatically flow from the Act itself (p. 193) and that it is not mechanically compelled by the Act (p. 198) and that before the Board may make such an order, it must make adequate *findings of fact* that such an order

will effectuate the policies of the Act (p. 196). Because the Board did not make such findings, this Court directed the Circuit Court of Appeals to remand the case to the Board for determination of this issue (p. 200).

4. The decision of the United States Circuit Court of Appeals that in a case of an unfair labor practice by an employer the Board may award back pay to a striking employee for the time during which he is on strike, even though there has been no request for reinstatement, is contrary to the decisions of other circuit courts of appeals on the same matter, as shown in the following cases:

*National Labor Relations Board v. American Manufacturing Co.*, 2 Cir., 106 Fed.(2d) 61, 68;

*United Biscuit Co. v. National Labor Relations Board*, 7 Cir., 128 Fed.(2d) 771, 778;

*Polish National Alliance v. National Labor Relations Board*, 7 Cir., 136 Fed.(2d) 175, 181.

In each of these cases, involving a strike following an unfair labor practice of an employer, the Court held that back pay should be awarded back only to the date of application for reinstatement. In other words, a striking employee cannot, at one and the same time, both strike and receive pay for the time during which he is on strike.

This Court's understanding of the proper rule would appear to be expressed in *Phelps Dodge Corporation v. National Labor Relations Board*, 313 U.S. 177, 198, Footnote 7, as follows:

“Even though a strike is caused by an unfair labor practice, the Board does not award back pay during the period of the strike. (*Matter of Sunshine Hosiery Mills*, 1 N.L.R.B. 664.)”



5. The decision of the United States Circuit Court of Appeals that back pay may be awarded for the period of time during which the employees unreasonably fail to file a proper charge (in this case, from July 17, 1937 to May 8, 1940) is in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. Mall Tool Co.*, 7 Cir., 119 Fed. (2d) 700.

In the latter case, the Court said (p. 702):

"It is obvious that undue delay in filing charges may not only prejudice the employer but also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent. The legislation contemplates that a proceeding such as this shall promote the public welfare; not that it shall benefit private parties in respects unrelated to that welfare."

Accordingly, the Court modified the Board's order so as to require back pay back only to the date of the filing of the charges, which was September 23, 1938 (p. 702, 704).

6. The decision of the United States Circuit Court of Appeals that the jurisdiction of the National Labor Relations Board shall be determined on the facts which exist at the time the complaint is filed is contrary to the decisions of other circuit courts of appeals on the same matter, as shown in the following cases:

*United Corporation v. Federal Trade Commission*,  
4th Cir., 110 Fed.(2d) 473;

*Chamber of Commerce of Minneapolis v. Federal Trade Commission*, 8th Cir., 13 Fed.(2d) 673.

In each of these cases, the Court held that where the administrative tribunal's power is regulatory or remedial and not punitive, and its orders operate in futuro, as is the case with the National Labor Relations Board, the issue of the tribunal's jurisdiction must be determined on the facts which exist at the time when the tribunal rendered its decision and not as of the earlier time when the tribunal filed its complaint.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein and that thereafter the judgment of the United States Circuit Court of Appeals be reversed by this Honorable Court and that your petitioner have such other and further relief as to this Honorable Court may seem meet and just.

Dated at San Francisco, California, this 11th day of July, 1945.

MAX THELEN,  
GORDON JOHNSON,  
*Attorneys for Petitioner,*  
*Cowell Portland Cement Company.*

